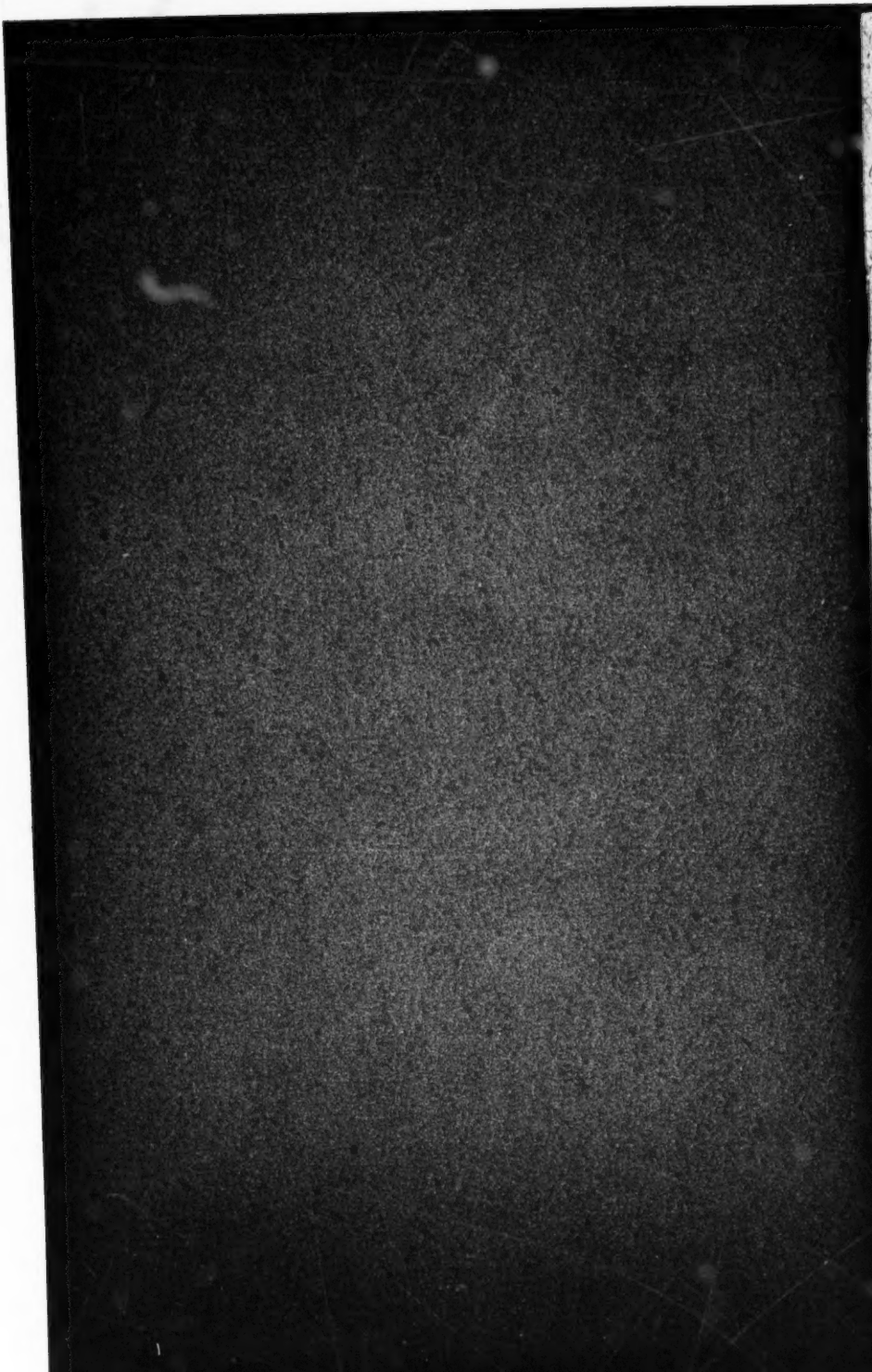

SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1973
No. 73-1545

STATE BOARD OF EDUCATION OF OHIO, *et al.*,
Petitioners,

vs.

AKRON BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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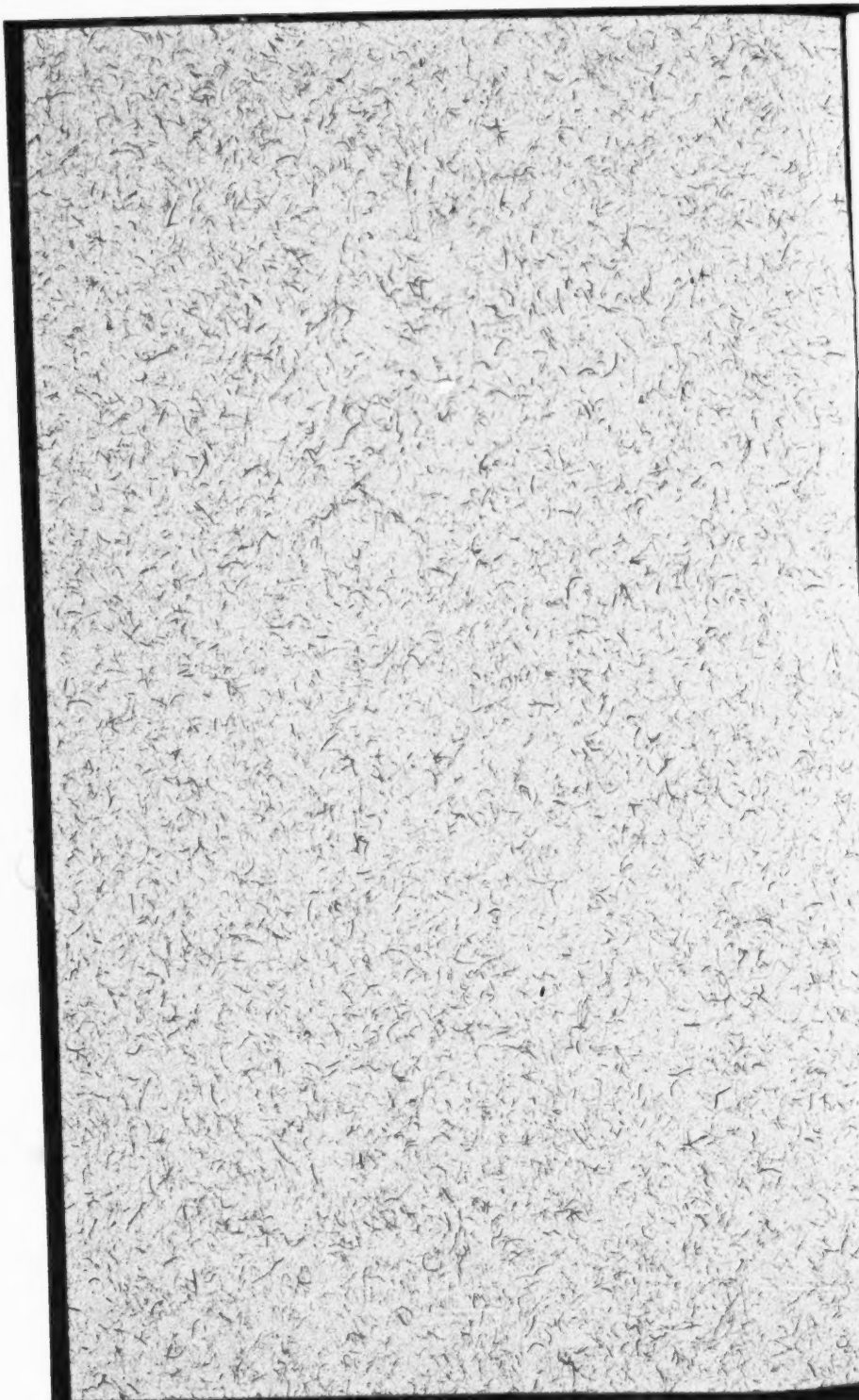

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Supreme Court of the United States

October Term, 1973

No. 73-1545

STATE BOARD OF EDUCATION OF OHIO, BRYCE L. WEIKER, WARD M. MILLER, CECIL M. SIMS, PAUL L. WALKER, EDWARD C. AMES, LORIN E. BIXLER, WILLIAM H. COSSLER, SUSAN D. GEORGE, RALPH H. GOETTLER, ROBERT J. GROGAN, WILLIAM M. JUDD, EVERETT L. JUNG, ROBERT W. KNUDSEN, ROBERT A. LYONS, SR., MILDRED MADISON, JOHN R. MECKSTROTH, ELLIOTT E. MEYERS, WAYNE E. SHAFFER, MARGARET H. SKELLY, FRANCIS W. SPICER, JEANNETTE WAGNER, ROBERT W. WALKER, ROBERT E. WILLIAMS, ALAN D. WRIGHT, and DR. MARTIN ESSEX, SUPERINTENDENT,

Petitioners,

vs.

AKRON BOARD OF EDUCATION and CONRAD C. OTT, SUPERINTENDENT OF SCHOOLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit correctly held that Respondents, the Akron Board of Education and Superintendent Conrad C. Ott, have standing to sue in Federal District Court in order to prevent racially motivated action whereby an all white area within a local school district is to be detached therefrom in violation of the Fourteenth Amendment to the United States Constitution?

2. Whether Respondents have standing to sue in Federal District Court, if upon remand, they amend their complaint as provided by the Court of Appeals to specifically allege jurisdiction under 28 U.S.C. Sec. 1331, and to add individual parties plaintiff when Respondents have already provided the basis for such action before the Courts below?

STATEMENT OF THE CASE

A. Statement of the Facts

The Akron Board of Education is a body corporate and politic existing by virtue of Ohio Revised Code Section 3313.17 with the power to sue and be sued, contract, and hold property. Under Ohio Revised Code Sections 3313.47 and 3313.48, the management and control of schools in Ohio are vested in local boards of education and free education to school age children is to be provided by them. The superintendent of a local district is also regulated by statute and among other powers, he is given the responsibility and duty to assign pupils of the schools under his supervision to proper schools and grades and perform such other duties as the Board determines. The State Board of Education is also a creature of an Ohio statute and under

Ohio Revised Code Section 3311.24 a special power is conferred upon it with respect to the transfer of territory from local school districts. The procedure of that section requires the filing of a petition by 75% of qualified electors voting at the last general election and residing within a particular area seeking to be detached. The State Board is then given the right to cause the proposed transfer of territory that is the subject of the petition to be approved or disapproved.

In the year 1972, some 52 residents, all of whom are white, of an area known as Sackett Hills Drive caused a petition to be filed seeking to secede from the Akron City School District. That school district is almost coterminous with the corporate limits of the City of Akron. The residents of the seceding area were located near the north corporation line of the City of Akron, but within its boundaries and sought to be transferred to an adjoining suburban and partly rural school district lying to the north.

The State Board of Education pursuant to the provisions of the Ohio Administrative Procedure Act (Ohio Revised Code Chapter 119) appointed a referee to hear evidence and opposing arguments from the petitioning residents and the Akron Board of Education respecting the proposed transfer of territory. The referee made a decision recommending the transfer and the State Board of Education adopted the recommendation and passed the resolution of approval required under the statute to cause the transfer of the residents' area to the adjoining suburban school district. The action in the court below was an attempt by the Superintendent and the Akron Board of Education specifically, to declare the action of the State Board invalid and enjoin any action by any person and specifically the Sackett Hills residents from filing or pursuing a mandamus action in State Courts to require Respondents to cause transfer of the territory.

B. Trial Proceedings

The action in the U. S. District Court below was one arising under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. Sec. 1983 by reason of a claimed denial of equal rights under the Constitution. Jurisdiction of the court was specially invoked under 28 U.S.C. Sec. 1343. The plaintiffs were the Board of Education of the City of Akron and the Superintendent of the Akron City School District (Respondents herein) who sued the State Board of Education of Ohio, all of its members, the Superintendent of the State Board, and a class of patrons in the District and their representatives.

By their action, the plaintiffs were attempting to prevent detachment of a portion of the Akron City School District and the transfer thereof to an adjoining rural school district by reason of a statutory approval by the State Board of Education of the residents' detachment petition. The plaintiffs complained that under applicable provisions of the statute, they would be required to permit an essentially all-white residential area to detach from the Akron City School District and that thereby the racial composition of certain public schools would be affected. Plaintiffs charged that the proposed transfer of the Sackett Hills area had resulted from the policy and practices of defendants (individually and collectively) by which patrons desiring to send their children to all white public schools outside an urban district in preference to racially mixed public schools within such a district could do so. In addition, plaintiffs claimed that they would be subjected to great and incalculable expense and would result in either the curtailment of educational progress or result in an increase in tax levies for Akron taxpayers, or both. This action was said to be violative of the Four-

teenth Amendment to the United States Constitution and 42 U.S.C. Sec. 1983 and injurious to the plaintiffs and to the children of the Akron City School District. Both declaratory and injunctive relief was sought.

The defendant State Board of Education, its members, and Superintendent filed a motion to dismiss on the grounds that the amended complaint failed to state a claim against the defendants upon which relief could be granted and that the court lacked jurisdiction over the subject matter.

The residents in the meantime filed a mandamus action in state court against Respondents to compel them to enact the necessary resolution for transfer of territory. That action still pends awaiting final resolution of the federal constitutional issue and the Ohio Supreme Court in a similar case has ruled that the state courts may not proceed to judgment in mandamus until then.

Before ruling on the motion to dismiss, plaintiffs' motion for a preliminary injunction with respect to the acts complained of in the amended complaint was considered by the court and the parties ordered to file stipulations and memorandum arguments with respect to the evidence in support of their respective positions by a date certain. The stipulations and memoranda were timely filed. Among other things, the stipulations filed by Plaintiffs before the Court's ruling identified the tax values of specific properties which would be removed from the tax rolls in the Akron City School District in support of the claim of pecuniary loss. Before considering the plaintiffs' motion, however, the trial court issued a memorandum opinion and order sustaining the defendants' motion to dismiss saying that there was a want of jurisdiction in the federal court to entertain the action. An appeal to the United States Court of Appeals for the Sixth Circuit was taken.

C. Court of Appeals Proceedings

On appeal, the United States Court of Appeals for the Sixth Circuit faced and answered the question of standing of the Akron Board of Education and Conrad C. Ott. In a split decision (with Judge Pratt concurring in part and dissenting in part and Judge Weick dissenting), the Court of Appeals reversed the District Court and remanded the case for further proceedings. Judge Edwards delivered the opinion for the court and clearly held that Respondents have standing to sue and that the District Court has jurisdiction of the case under 42 U.S.C. Sec. 1983, and 28 U.S.C. Sec. 1343. Judge Edwards was authorized to state that the Court's summary had the full concurrence of Judge Pratt.

In his separate opinion, Judge Pratt agreed that Respondents have standing to sue, and emphasized that on remand Respondents should have an opportunity to amend in order to add parties plaintiff and to allege jurisdiction under 28 U.S.C. Sec. 1331.

In his dissent, Judge Weick was concerned with the issue before the Court and with plaintiffs' review in state courts.

RESPONDENTS' REASONS FOR DENYING THE WRIT OF CERTIORARI

A. The Holding of the Court of Appeals Is Fully Justified by the Decisions of This Court and Other Federal Courts

In writing the opinion of the United States Court of Appeals for the Sixth Circuit, Judge Edwards found that Respondents have standing to bring this action and that the District Court has jurisdiction to enforce the Fourteenth Amendment of the United States Constitution. Respondents respectfully submit that the decision of the Court of Appeals is correct and should not be reviewed. This decision was reached and supported by sound reasoning achieved by a systematic and vigorous analysis of the appropriate decisions on standing that have previously been decided by this Court.

There can be no question that the complaint and allegations (which to date have gone unanswered) stated a violation of the Fourteenth Amendment Equal Protection of the Laws. The essential question raised by the trial court and argued at length by Judge Weick in the Court of Appeals has been answered by the majority in the Court of Appeals. However, Petitioners have misconceived the real issue in casting the question in terms of the right of an inferior state agency to sue a superior state agency in the federal court. Rather, the question presented—if facts were permitted to develop—would be whether a racially motivated transfer on the petition of patrons accomplished under color of law is unreviewable merely because the state agency sanctions a procedure for dismemberment of an urban district occasioned by demand of white patrons under an undefinable standard in the applicable statute. The

essential fact that the injunction seeks to prevent such patrons from pursuing the mandamus which was in fact filed—thereby to compel the transfer—has been missed.

In any event, Judge Edwards easily found Respondents to have standing based on no less than three separate and viable positions. Based upon the case authority cited, each of these positions taken alone would support his finding of standing; together, without question, they provide the nucleus of authority which allows, even necessitates, that Respondents sue in this case to vindicate the constitutional rights of Respondents' pupils, patrons and Respondents, which all have been threatened by the resident Petitioners' action.

First, Judge Edwards noted that standing to sue "is only a rule of practice" (*Barrows v. Jackson*, 346 U.S. 249, 257 (1953)) which upon meeting certain criteria present in this case, can be invoked to allow plaintiffs to have standing to sue for the protection of the constitutional rights of third parties where a close relationship exists between the plaintiffs bringing the action and the class of persons whose constitutional rights are alleged to be violated (Petitioners' Brief, Appendix, page A6).

Respondents seek to protect the constitutional rights of the pupils and their parents by reason of the uniqueness of Respondents' relationship with them and duties owed to them. Precedent has long been established by this Court for such action. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Moreover, the facts and allegations herein go beyond a mere close relationship and duty. In addition, Respondents herein ultimately stand to suffer direct injury-in-fact by reason of loss of territory, loss of tax dollars, and the foreseeable loss of the ability to continue the same high quality and quantity of education. Failure to halt this constitutionally violative practice at

this time could cause Respondents to incur incalculable expenses in attempting to halt future attacks of this manner.

Nevertheless, even without the direct injury believed and alleged by Respondents to threaten their revenues and rights "injury in fact" has been found without particularization of injury simply because they are thought to be entitled to safeguard the Fourteenth Amendment rights of school children in their charge. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956).

Second, Judge Edwards has correctly focused on the significance of allowing an organization to sue to defend the constitutional rights of its members when such members are neither cognizant of the dangers at hand nor able to afford the time and expense involved to protect such rights. The right of an organization to sue in defense of the rights of its members has been delineated by this Court in *NAACP v. Button*, 371 U.S. 415, 428 (1963). Constitutional violations are no less severe to an organization and its members merely because of the subtle manner in which damage is inflicted. Moreover, the ability of Respondents to be able to sue to defend the constitutional rights of their members becomes more compelling when the:

> ". . . small area concerned and its minimal present impact would be much less likely to come to the attention of said parents or arouse their concern that (sic) it would come to the attention of and arouse the concern of the School Board, which is the immediate object of the order alleged to be unconstitutional. Thus if jurisdiction is refused in a precedent-setting case because the potential litigants, alert to the possible constitutional abuse, are denied standing, quite a bit of the unconstitutional camel may be in the

tent before the tent's less alert occupants are awakened." (Petitioners' Brief, Appendix, page A7).

Third, Judge Edwards has acknowledged that Respondents have been given a special charge under law to uphold the Constitution of the United States. They have a duty to protect the Fourteenth Amendment rights of such third persons and to resist actions which would violate such rights or which are contrary to the laws of the land. On this point, Judge Edwards incisively notes that failure to grant Respondents' standing:

". . . would subject plaintiffs (Respondents herein) to being defendants in a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional. *At least theoretically it might subject individual members of the Board and the Superintendent to suits for damages* under the Civil Rights Act. 42 U.S.C. § 1983, (1970)." (Petitioners' Brief, Appendix, page A8. Emphasis added).

Authority for this proposition, viz. that those who have a duty to act under the Constitution of the United States necessarily have the right to be free from interference with such duty by seeking the jurisdiction of Federal Court, can be found in *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956). The Court of Appeals has correctly cited this decision at length as further support for standing of Respondents. *See also Bell v. Hood*, 327 U.S. 678, 684 (1946).

Similarly, this Court has found that a local school board has such a "personal stake in the outcome" of litigation as to uphold its standing in Federal Court to test the validity of a State Statute. *Board of Education v. Allen*, 392 U.S. 236, 241, n. 5 (1968). Citing *Baker v. Carr*, 369 U.S. 186, 204 (1962). (Petitioners' Brief, Appendix, page A11).

Surely given the reasons articulated by the majority of the Court of Appeals, Respondents have standing. Needless to say, the criteria for standing cited by Petitioners (Petitioners' Brief, page 10) have been met and consequently the questions they seek to have reviewed are moot.

Respondents respectfully submit that Petitioners have attempted to erroneously restrict and unjustifiably interpret the dynamic authorities of this Court and other Federal Courts as they apply to the question of standing in this case. The decision of the United States Court of Appeals is fully justified in this case and should not be overturned.

B. The Petition for Writ of Certiorari Is Premature in This Case

Respondents respectfully maintain that they have standing as provided by the majority of the Court of Appeals; nevertheless, any question which may not have been answered and any objection which may not have been met will surely be rectified upon remand to the District Court. Both Judge Edwards and Judge Pratt have provided that upon remand Respondents should be permitted to move the District Court to amend to add additional parties plaintiff and to state a jurisdictional basis for the case under 28 U.S.C. Section 1331. Such action surely means that Petitioners' Writ of Certiorari is premature.

The addition of individual parties plaintiff would fully overcome the trial court's objection that none of the Respondents have standing to bring this action. The allegations of jurisdiction, if sustained on the basis of evidence, would further overcome an objection of failure of federal

jurisdiction on the theory that 28 U.S.C. Sec. 1343 and 42 U.S.C. Sec. 1983 could be read to permit an action by any of the Respondents.

The Court of Appeals below was clearly within its rights to require the District Court to allow the suggested amendments, particularly when Respondents were never given such opportunity to avoid dismissal in the trial court. 3 MOORE'S FED. PRAC. Sec. 1509. *Bell v. Hood*, 327 U.S. 678 (1946); *Stern v. Beer*, 200 F.2d 794 (6th Cir. 1952); *Christensson v. Hogdal*, 199 F.2d 402 (D.C. Cir. 1952).

Indeed, the Court of Appeals may permit such amendment even in the case where the District Court has afforded such an opportunity. *Purofied Down Products Corp. v. Travelers Fire Ins. Co.*, 278 F.2d 439 (2nd Cir. 1960).

C. No Point Would Be Served by a Reversal of the Decision of the Court of Appeals

If the decision of the Court of Appeals would be reversed and the case dismissed, Respondents could immediately file a suit to overcome the alleged jurisdictional and standing defects. The same result will be accomplished by a grant of a motion to amend upon remand pursuant to the opinion of the Court of Appeals—all accomplished without review. In point of fact, the Ohio Supreme Court has not seen fit to permit state courts to review administrative action on the basis of a violation of a federal constitutional right. *State of Ohio ex rel. Zellner v. Board of Education of Cincinnati*, 34 Ohio St. 2d 199 (1973). The result reached in this Ohio Supreme Court case was duly considered by the Court of Appeals (Petitioners' Brief, Appendix, page A12). Thus under State

law, the action would have to be filed again in the federal court unless it were held that under no set of circumstances could Board members individually, the Superintendent and the Akron Board of Education as a body politic bring an action to vindicate constitutional rights jeopardized by the actions of Petitioners.

CONCLUSION

For the reasons provided herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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